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SUPREME COURT, U.S.

NO. 80-5060

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

LONNIE JOE CARTER — PETITIONER

VS.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY — RESPONDENT

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APPENDIX

QUESTION PRESENTED FOR REVIEW

IS IT A DENIAL OF A CRIMINAL DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST COMPULSORY INCRIMINATION AND TO DUE PROCESS OF LAW FOR A STATE COURT TO REFUSE TO INSTRUCT THE JURY THAT "THE DEFENDANT IS NOT COMPELLED TO TESTIFY AND HIS FAILURE TO DO SO CANNOT PREJUDICE HIM OR BE USED AS AN INFERENCE OF GUILT" WHEN IT IS CLEAR THE DEFENDANT DECLINES TO TESTIFY FOR A REASON UNRELATED TO GUILT OR INNOCENCE AND COMMENT IS MADE AT TRIAL BY COUNSEL AND WITNESSES REGARDING THE DEFENDANT'S FAILURE TO EXPLAIN HIMSELF TO THE POLICE AND FAILURE TO TESTIFY AT TRIAL?

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Petitioner, Lonnie Joe Carter, respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on May 13, 1980.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on May 13, 1980 and is not to be published [Appendix, hereinafter A, 1-13].

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on May 13, 1980. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person...shall be compelled in any criminal case to be a witness against himself...

The Fourteenth Amendment to the United States Constitution, in pertinent part:

> ...nor shall any State deprive any person of liberty...without due process of law...

STATEMENT OF THE CASE

Lonnie Joe Carter was indicted by the February, 1979 Christian County Grand Jury for third degree burglary of Young's Hardware store in Hopkinsville and as a persistent felony offender. Kentucky Revised Statute [KRS] 511.040; KRS 532.080 [Transcript of Record, hereinafter TR, 6]. Petitioner's trial was held May 17, 1979 [Transcript of Evidence, hereinafter TE, 1].

Officer Deborah K. Ellison of the Hopkinsville Police Department was on downtown patrol on the night of December 22, 1978 and noticed two black males in an alley. They began to run and she attempted to pursue. She called Officer Davis, who was nearby in another car, for assistance as she lost sight of the two men. Officer Ellison noticed that some bricks had been removed from the wall to Young's Hardware [TE, 24-33]. Officer Davis apprehended petitioner in the vicinity [TE, 60-61].

Petitioner was brought to the police station. Officer Ellison testified in detail that petitioner "didn't want to say anything" and refused to sign a "waiver

certificate" [TE, 36-39; CW. EX. 15]. Officer Davis also testified that during questioning petitioner refused to cooperate [TE, 67-68].[1]

The prosecution's evidence consisted of Officer Ellison's testimony that the "subject" (petitioner) "appeared" to have the same clothing as "the man I saw running" [TE, 34]. Officer Ellison stated that "it was fairly dark in the alley and I didn't get a real close look at his face" [TE, 45]. Additionally, two items allegedly dropped by petitioner were introduced, a bag and a radio said to be a set on a police band [TE, 64]. Finally, after repeatedly refusing to answer questions, petitioner allegedly admitted that two jackets found in the alley were both his [TE, 39].[2]

After the prosecution rested, a hearing was held regarding whether petitioner would testify and whether he would be impeached with prior felony convictions [TE, 96-106]. Petitioner was facing a second count of the indictment as a persistent felon offender. The record indicates that petitioner did not testify because he was going to be impeached by the use of three prior felonies—two of which were to be in issue during the second (PFO) phase of the trial. Pursuant to Cotton v. Commonwealth, Ky., 454 S.W.2d 698 (1970), petitioner would have been required to admit the prior convictions which were to be in issue during the second proceeding. The record states:

> THE COURT: ...I would suggest that you pick out the most recent ones and if you could avoid the two that are involved in the second stage you would probably be better off.
>
> THE PROSECUTOR: I can't do that for those are the two most recent ones so that's the way it has to be.
>
> THE COURT: Well, there's no rule that I know of that prohibits using those. It seems a little bit strange that they split the trial and made two stages of it with two aggravating or enhancing convictions or whatever you want to call them. [TE, 102-103.]
>
> * * * *
>
> LONNIE JOE CARTER: Are you saying the most

---

[1]Trial defense counsel did not object at the time of the police officers' testimony regarding petitioner's refusal to cooperate with the police. However, trial counsel's objection was overruled when the prosecutor mentioned during his opening statement the questioning of petitioner by the police officers [TE, 20]. Nevertheless, the Supreme Court of Kentucky held that the issue of comment upon petitioner's silence at the time of arrest was not properly preserved for review. Carter v. Commonwealth, Memorandum Opinion, slip opinion at 4-5 (May 13, 1980) [A, 4-5]. This alleged constitutional violation is not being raised in this petition.

[2]The Kentucky Supreme Court held that the police officer's failure to "scrupulously honor" petitioner's wish to remain silent was not preserved for review. Carter v. Commonwealth, supra at 3 [A, 3]. Again, this potential constitutional violation is not raised in this petition.

recent convictions?

THE COURT: Well, they are the ones he plans to use. Now, you do understand what you are charged with?

LONNIE JOE CARTER: Yes, sir.

THE COURT: All right, you talk to Mr. Rogers and then tell us what you want to do.

* * * *

THE COURT: Now, Lonnie, you have come back after a private conference with your lawyer, Mr. Rogers and you have told me you have decided not to take the stand?

LONNIE JOE CARTER: Yes, sir. [TE, 104.]

Petitioner did not testify and presented no other evidence. Defense counsel tendered, and the trial court refused, an instruction on petitioner's right not to testify. The instruction states:

> The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way. [TR, 22; A, 14.]

In closing argument, defense counsel argued to the jury:

> Why didn't Mr. Carter take the stand and testify? Let me tell you... He doesn't have to take the stand in his own behalf. He doesn't have to do anything. [TE, 108-109.]

In his closing argument, the prosecutor repeatedly referred to the evidence as "not controverted" [TE, 119-120]. He also argued: "Consider only what you have heard up here as evidence in this case and not something that you might speculate happened or could have happened..." [TE, 115].

Petitioner was convicted and sentenced to two years [TE, 127]. After the second phase of the trial, the jury found petitioner guilty as a persistent felony offender and sentenced him to the maximum, twenty years, ten years without parole [TE, 143].

On May 13, 1980, the Kentucky Supreme Court affirmed petitioner's conviction. The Court specifically rejected petitioner's argument that the Fifth and Fourteenth Amendments to the United States Constitution require that a protective instruction be given regarding a criminal defendant's right not to testify when a timely request is made at trial. The Court relied upon its previous decision in Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972). Petitioner now seeks review of this decision by this Court.

REASON FOR GRANTING THE WRIT

THE OPINION BELOW CONFLICTS WITH THE RATIONALE OF PRIOR DECISIONS OF THIS COURT, INCLUDING BRUNO V. UNITED STATES, GRIFFIN V. CALIFORNIA AND LAKESIDE V. OREGON, AS WELL AS DECISIONS IN THE VAST MAJORITY OF JURISDICTIONS. THE PRESENT CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW SPECIFICALLY LEFT OPEN BY THIS COURT IN GRIFFIN.

A. THE QUESTION PRESENTED IS NARROW AND PROPERLY BEFORE THIS COURT

The question presented in this Petition is a narrow one. This Court is asked to decide whether, as a matter of due process, a state trial court must give a protective instruction upon timely request by defense counsel regarding a criminal defendant's right not to testify at trial. The question presented is properly before this Court because petitioner tendered an appropriate instruction at trial and the Kentucky Supreme Court specifically rejected petitioner's argument that "[t]he trial court's refusal to instruct the jury regarding appellant's right not to testify, in light of the facts of this case, violated the Fifth and Fourteenth Amendments...." Carter v. Commonwealth, supra at 5 [A, 5].

The present case presents an appropriate vehicle for deciding this important constitutional question because petitioner's argument is specifically related to the facts of his case. While petitioner asserts that the Fifth and Fourteenth Amendments require a protective instruction regarding the defendant's failure to testify in all cases where a timely request is made, petitioner submits that, as a constitutional minimum, the requested instruction should have been given under the facts of this case. The record reflects that petitioner did not testify for reasons unrelated to guilt or innocence. Petitioner was facing a first degree persistent felon charge which carries a mandatory sentence of ten years without parole. KRS 532.080(7). No harsher parole eligibility term exists under Kentucky law. Even a convicted murderer is eligible for parole after six years. Had petitioner testified, he would have had to admit the prior felonies which were to be in issue during the second proceeding.[3] The fact that petitioner chose not testify for reasons unrelated to guilt or innocence dramatizes the need in this case for a protective instruction.

Additionally, the prosecution made petitioner's refusal to cooperate with the police at the time of arrest a principle issue at trial. When petitioner failed to testify, it became clear to the jury that petitioner had never explained himself to anyone. During closing argument, defense counsel stated that petitioner

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[3]Kentucky employs a bifurcated proceeding in persistent felon cases. KRS 532.080(1).

"doesn't have to take the stand in his own behalf. He doesn't have to do anything" [TE, 108-109]. However, in the absence of a protective instruction, this correct statement of constitutional law was likely dismissed by the jurors as inaccurate and possibly perceived as arrogance. Furthermore, the prosecutor made indirect comments about petitioner's failure to testify. The unique facts of the present case suggest a compelling need for the protective instruction requested by petitioner. In light of these facts, petitioner submits that the present case would be an appropriate context in which to decide this important issue of federal constitutional law.

B. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

In Bruno v. United States, 308 U.S. 287 (1939), this Court held that an accused in a federal criminal case is entitled upon timely request to the substance of the cautionary instruction tendered by petitioner in the trial court. This Court based its holding solely upon interpretation of a federal statute. 28 U.S.C. § 632 (presently 18 U.S.C. § 3481). Mr. Justice Frankfurter noted that this Court had granted certiorari because the question presented was "an important question in the administration of federal criminal justice...." Id. at 291.

Subsequently, in Griffin v. California, 380 U.S. 609 (1965), this Court held that the Fifth Amendment forbids either comment by the prosecution on an accused's silence or instructions by the court that such silence is evidence of guilt. However, this Court also specifically stated:

> We reserve decision on whether an accused can require, as in Bruno v. United States... that the jury be instructed that his silence must be disregarded. Griffin, supra at 615, n.6.

Petitioner submits the question presented is an important federal constitutional question which should be decided, and can only be laid to rest, by this Court.

C. THE OPINION BELOW CONFLICTS WITH THE RATIONALE OF PREVIOUS DECISIONS OF THIS COURT

In Bruno v. United States, supra, this Court unanimously held that a criminal defendant in a federal trial has an absolute right to the protective instruction requested by petitioner below. While this Court's decision did not rest upon the Fifth Amendment, the rationale of the Bruno decision supports petitioner's contention. This Court implicitly recognized "the psychological operation of the jury's mind" in considering a criminal defendant's failure to

testify. Id. at 293. In interpreting a statute similar to Kentucky's, KRS 421.225, this Court indicated that:

> The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their judicial duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts. Id.

Petitioner would also submit that the rationale of Griffin v. California, supra, supports petitioner's contention. Mr. Justice Stewart, joined by Mr. Justice White, in dissent, pointed out:

> ...whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions the danger exists that the inferences drawn by the jury may be unfairly broad. Some states have permitted this danger to go unchecked, by forbidding any comment at all upon the defendant's failure to take the witness stand. Id. at 623. [Emphasis added.]

The dissent in Griffin refers specifically to Kentucky as letting this danger "go unchecked" in footnote 9. Id.

Recently, in Lakeside v. Oregon, 435 U.S. 333 (1978), this Court specifically rejected the argument that the protective instruction requested here constituted "comment" within the meaning of Griffin. This Court noted that Griffin only condemned "adverse comment." Lakeside, supra at 339. This Court equated petitioner's requested "no inference" instruction with other basic instructions which must be given to insure due process of law:

> The very purpose of a jury charge is to flag the juror's attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no different. Lakeside, supra, at 340. [Emphasis added.]

The protective instruction requested by petitioner in this case deals with an explicit constitutional right so fundamental in nature as to give rise to a due process violation when it is refused. In Taylor v. Kentucky, 436 U.S. 478 (1978), this Court held that under the circumstances of a particular case it was a due process violation for a state trial judge to refuse to instruct on another fundamental (although implied) constitutional right, the presumption of innocence. As in Taylor, "the ordinary citizen well may draw significant additional guidance from an instruction..." protective of the defendant's right not to testify. Id. at 484. Such an instruction would have a "salutary effect upon lay jurors." Id. The

requested instruction in the present case was "one way of impressing upon the jury the importance of" petitioner's constitutional right to remain silent. Id. at 485. Even the dissenting justices in Taylor noted that:

> In this case the omission [of the instruction] did not violate a specific constitutional guarantee such as the privilege against compulsory self-incrimination. Id. at 492. [Emphasis added.]

In the present case, the refusal of petitioner's requested instruction violated a specific right guaranteed to the defendant by the Fourteenth Amendment. Cf. Cupp v. Naughten, 414 U.S. 141, 146 (1973).

Petitioner submits that the rationale of these previous decisions of this Court conflicts with the opinion below.

D. THE OPINION BELOW AND THE RATIONALE OF KENTUCKY DECISIONS

The Kentucky Supreme Court affirmed petitioner's conviction and rejected the contention presented here on the basis of Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972). The Kentucky Supreme Court has considered the issue presented on several occasions. The results reached by the Court, however, have not been consistent. In a number of early cases the Court condemned instructions of the type involved here. Tines v. Commonwealth, 25 Ky.Law Rep. 1233, 77 S.W. 363, 364 (1903); Armstrong v. Commonwealth, 190 Ky. 217, 227 S.W. 162, 163 (1921); Hanks v. Commonwealth, 248 Ky. 203, 58 S.W.2d 394, 395 (1933); Roberson v. Commonwealth, 274 Ky. 49, 118 S.W.2d 157, 158 (1938). In later cases, the Kentucky Court held that a defendant was entitled to the "no inference" instruction upon request. Kelley v. Commonwealth, 300 Ky. 136, 187 S.W.2d 796, 800 (1945). These cases were decided under statutes virtually identical to KRS 421.225, which states:

> 421.225 Testimony of defendant
>
> In any criminal or penal prosecution the defendant on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.

In Spencer v. Commonwealth, Ky., 467 S.W.2d 128, 130-131 (1971), the Kentucky Supreme Court again construed KRS 421.225 as requiring the "no inference" instruction:

> Although our Kentucky Constitution does not specifically safeguard to the defendant an instruction on his failure to testify, we are of the opinion that in view of KRS 421.225(1) the defendant is entitled to an instruction when properly requested. Id. at 131.

Subsequently, however, the Kentucky Court again changed its position and repudiated this language in Scott v. Commonwealth, Ky., 495 S.W.2d 800, 802 (1973), as being mere dictum. In Green v. Commonwealth, supra, and the present case, the Kentucky Supreme Court also rejected contentions that a protective instruction is required. Green is based on the Kentucky Supreme Court's opinion that:

> ...the requested "no inference" instruction... would have been a direct "comment" by the court and would have emphasized the fact that the accused had not testified in his own behalf. Id. at 341.

This rationale, perhaps an overreaction to Griffin, was contradicted by this Court in the Lakeside decision. In Lakeside, this Court spoke of the purpose of the requested protective instruction:

> ...its very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences. It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect. Id. at 339.

Petitioner submits that the position of the Kentucky Supreme Court is based upon what this Court called two "very doubtful...speculative...[and] dubious..." assumptions. Lakeside, supra at 340.

> First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own. Second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Id. [Footnotes omitted.]

Petitioner submits that the rationale of this Court in Lakeside is in direct conflict with the decision below.

E. THE DECISION BELOW CONFLICTS WITH THE VAST MAJORITY OF JURISDICTIONS

Without a doubt, the overwhelming majority of the courts in this country have required that jurors in criminal trials be given the cautionary instruction requested by petitioner below upon timely motion by defense counsel. An incomplete jurisdictional survey made be found in the appendix [A, 15-16]. The decision below is in conflict, not only with the position of this Court and all of the federal circuits, but at least thirty-two state jurisdictions [A, 15-16]. Petitioner's research has, thus far, disclosed only two other jurisdictions besides Kentucky which refused the "no inference" instruction [A, 16]. The requested instruction was essential to a fair trial in the present case. See Commonwealth v. Sullivan, 239 N.E.2d 5, 16 (Mass. 1968); State v. Garcia, 505 P.2d 862, 863-864

(N.M. 1972). In addition to the authorities listed in the appendix, see generally State v. Baxter, 454 P.2d 366, 367 (Haw. 1969); State v. Buchanan, 412 P.2d 565, 567 (N.M. 1966); State v. Emrick, 278 A.2d 712 (Vt. 1971). See also State v. Cook, 157 N.W.2d 151, 155 (Neb. 1968); People v. Gaulden, 111 Cal.Rptr. 803, 811 (1974); State v. Wallace, 152 N.W.2d 266, 270 (Iowa 1967).

Petitioner submits that the conflict between Kentucky and the vast majority of jurisdictions is an especially important reason for this Court to grant review of this significant constitutional question.

CONCLUSION

The present case presents the compelling, as of yet unresolved, constitutional question of whether, and under what circumstances, a state trial court must, upon timely request, give a protective instruction regarding a criminal defendant's right not to testify. This question has been left open for many years by this Court and the administration of justice would benefit from a final resolution of this question. The decision below conflicts with the rationale of prior decisions of this Court, the vast majority of jurisdictions which have decided the question and even past decisions by the Kentucky Supreme Court. For all the reasons stated above, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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RENDERED: May 13, 1980
Not to be published

SUPREME COURT OF KENTUCKY
No. 79-SC-452-MR

LONNIE JOE CARTER — APPELLANT

V. — APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE STEPHEN P. WHITE, JUDGE
Indictment No. 79-CR-24

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION PER CURIAM

AFFIRMING

Lonnie Joe Carter, the appellant, was indicted by the February 1979, Christian County Grand Jury for third-degree burglary (KRS 511.040) of Young's Hardware Store in Hopkinsville, Kentucky. Appellant was also indicted as a persistent felony offender pursuant to KRS 532.080.

In the early hours of December 22, 1978, Officer Ellison of the Hopkinsville City Police Department, while on routine patrol through the downtown area, passed by the alley between Young's Hardware Store and Edna's Furniture Store and noticed something in the alley. When she flashed her spotlight down the alley she saw two black males kneeling in the alley. The men took off running and Officer Ellison radioed Officer Davis, who was also on patrol in the area. Officer Davis saw the two suspects running away and

took off after them. The two men split up. Officer Davis pursued and caught one of them. It turned out to be Lonnie Joe Carter, the appellant. During the course of the chase, the appellant dropped two objects, which turned out to be a gym bag and a police band portable radio. The appellant was wearing gloves but no jacket, despite the fact that it was a bitterly cold night.

After calling Officer Davis, Officer Ellison inspected the wall of the building and found a sizeable hole. She also noticed that some items of merchandise from inside the store had been removed and were in the alley. Also in the alley were two jackets. Upon hearing that Officer Davis had one of the men in custody, Officer Ellison went to where the man was being detained and noted that he had on the same color clothes as one of the men she had seen in the alley.

After being taken to police headquarters and being booked, the appellant was read his Miranda rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)) and was asked by Officers Ellison and Davis if he would like to sign the standard waiver form and make a statement. The appellant indicated that he understood his rights, but that he did not care to make a statement at that time. Shortly thereafter, Rusty A. Colon, a Major with the Hopkinsville Police Department, entered the room and started a conversation with the appellant, during which the appellant made certain incriminating statements which are in issue in this appeal.

A trial was held on May 17, 1979, in the Christian Circuit Court at which the appellant was found guilty of third-degree burglary

and of being a first-degree persistent felony offender. The appellant received sentences of two years and 20 years' imprisonment, respectively, for these convictions. On this appeal nine alleged errors are presented.

I

> "Appellant has been denied his rights against compulsory self-incrimination and to counsel in violation of the 5th, 6th and 14th amendments to the United States Constitution and Section 11 of the Kentucky Constitution when the police failed to 'scrupulously honor' his decision to remain silent."

The record reflects that the appellant was, promptly after his arrest, advised of his Miranda rights by Officer Ellison. During her interrogation by the Commonwealth, Officer Ellison explained that the appellant refused to waive his Miranda rights, refused to make a statement, and requested a lawyer. Shortly thereafter, Major Colon, in the absence of the other officers, talked to appellant for a few minutes about the crime. Counsel for appellant did not object to this line of interrogation and, as a matter of fact, in his cross-examination pursued the same line of inquiry.

In Spillman v. Commonwealth, Ky., 465 S.W. 2d 925 (1971), this court was confronted with a situation similar to that now presented. In disposing of the issue, we said, "(t)he failure to raise the question in the trial court precludes its consideration on appeal."

The appellant made no objection; consequently, the issue was not preserved for appellate review.

II

"Testimony by Officers Ellison and Davis that appellant refused to answer police questions and introduction of a Miranda waiver form indicating appellant refused to waive his rights deprived appellant of his federal and state constitutional rights to remain silent."

Counsel for appellant argues that in spite of his Miranda protection, the length of time it was brought to the attention of the jury constitutes a violation of this protection. We need not reach this charge since no objection was made at the time the issue first presented itself. Spillman v. Commonwealth, supra. The one and only objection made by appellant's counsel had nothing to do with Miranda-rights protection. It pertained to hearsay evidence contained in an answer. The Commonwealth's Attorney asked Officer Ellison whether she had any conversation with the appellant about this crime. The following is reflected by the record:

"A. No, sir, when we brought him down to the station he didn't want to say anything. There was another officer there who did say something about whose coats they were and Mr. Carter said that they were his coats.

Objection by Hon. W. E. Rogers, III:

Judge, I object to the hearsay.

The Court:

Yes, that is hearsay testimony and I believe you will have to get that from another party."

The court sustained the objection, and no request for an admonition was sought and none was given by the court. Evidently, counsel for appellant was satisfied with having his objection sustain-

ed without having the court admonish the jury. In this situation the issue is not preserved for appellate review. Brock v. Commonwealth, Ky., 391 S.W. 2d 690 (1965).

III

> "The trial court denied appellant due process of law and a fair trial by failing to hold an evidentiary hearing, out of the presence of the jury, regarding appellant's incriminating statements pursuant to RCr 9.78."

Counsel for appellant argues that RCr 9.78 mandates that the trial judge hold a hearing out of the presence of the jury before admitting incriminatory statements which were supposed to have been made by appellant after having been given his Miranda warning. RCr 9.78 provides that if there is a timely objection made to such testimony, then, and in that event, the court must hold such a hearing. In this case there was no objection. The objection to which counsel for appellant makes reference appears in the Commonwealth's Attorney's opening statement to the jury. Remarks made by the Commonwealth's Attorney in his opening statement are what he expects to prove. Objections to such statements do not obviate a challenge when the objectionable line of testimony is sought to be pursued in the course of the trial. The opening statement does not constitute the admission of evidence within the terms of RCr 9.78. This issue was not preserved for appellate review.

IV

> "The trial court's refusal to instruct the jury regarding appellant's right not to testify, in light of the facts of this case, violated the 5th and 14th amendments and Section 11 of the Kentucky Constitution."

The appellant did not testify. His counsel argues in the alternative, the appellant was entitled to an instruction on his right to remain silent and not testify or if he is not entitled to such an instruction then, and in that event, the comments of the Commonwealth's Attorney in his closing summation to the jury concerning appellant's failure to testify were prejudicial error.

KRS 421.225 provides:

> "Testimony of defendant.- In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

In Green v. Commonwealth, Ky., 488 S.W. 2d 339 (1972), this court had under consideration a request by an accused that the court instruct the jury that no inference of guilt should be drawn from his failure to testify. This question was considered by this court and we concluded that, "(t)he trial court did not err in refusing to give Green's requested instruction."

Appellant's latter argument that the comments of the Commonwealth's Attorney in his closing statement to the jury were prejudicially erroneous is no more meritorious than the argument for an instruction on his failure to testify. Counsel for appellant was afforded the privilege of making the first summation to the jury. The Commonwealth's Attorney was then afforded the privilege of concluding the arguments, readying the submission of the case to the jury for its consideration. The closing summation for the appellant commences as follows:

"Ladies and Gentlemen of the Jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. * * * He doesn't have to take the stand in his own behalf. He doesn't have to do anything. * * *"

The comments of the appellant's attorney were an invitation for the Commonwealth's Attorney to attack, which he did. The error on the part of the court, if any, was at the invitation of appellant and he will not now be heard to complain. Wright v. Jackson, Ky., 329 S.W. 2d 560 (1959). Irrespective of the characterization made by appellant's counsel of the Commonwealth's Attorney's closing argument, there was no objection made to any of it. It is now too late to cry foul.

V

"The trial court abused its discretion and denied appellant due process of law by permitting the Commonwealth to impeach appellant with prior felonies which were in issue during the second (P.F.O.) phase of the trial."

It is clear that the appellant did not take the stand; consequently, there was no impeachment.

The appellant also argues that after he had been found guilty of the primary offense, third-degree burglary, the court should have impanelled a new jury to hear the persistent felony charge. This argument was discussed in Brown v. Commonwealth, Ky., 551 S.W. 2d 557 (1977). We hold to the contrary. The trial court did not err in this respect.

VI

"The trial court denied appellant due process of law by refusing to declare a mistrial and by refusing to exclude incriminating statements when it became clear that the prosecutor had not disclosed physical evidence and incriminating statements as requested."

Appellant filed a request for a bill of particulars on February 28, 1979. One of the requests was "A copy of any statement, written or oral, made by the Defendant or any co-defendants." In response, the Commonwealth's Attorney answered "None." The incriminating statements to which counsel for appellant now refers are those to which the Commonwealth's Attorney made mention in his opening statement. We have heretofore opined that the issue as to the competency of the incriminating statements was not properly preserved for appellate review since appellant's counsel had not objected when the questioned testimony was offered.

The request for the bill of particulars filed was sufficiently broad in other sections thereof to have required that their existence and the intent of the Commonwealth's Attorney to use them on trial should have been disclosed to counsel for appellant with the other disclosures. This was not done. The existence of the gloves was made known in the testimony of Officer Davis and was pursued in the cross-examination by appellant's counsel. No objection was made when the question arose; however, at the conclusion of Officer Davis' testimony, appellant's counsel made a motion for a mistrial, which was denied. Objections to a particular question or to a particular line of interrogation must

be made when the testimony is offered. No objection was made when Officer Davis disclosed the existence of the gloves. The objection was first made after this witness had been interrogated both by the Commonwealth's Attorney and the appellant's counsel. Appellant cannot now complain.

VII

"The trial court denied appellant due process of law by instructing the jury that pre-trial incarceration would count toward any sentence imposed and by refusing to instruct the jury regarding the ten year mandatory sentence without parole for first degree persistent felons.

A. Pre-trial incarceration"

In appellant's closing argument to the jury his counsel said:

"Now, I want to tell you something. The police and the prosecution and the state are not helpless. Now, this man (again pointing to defendant) is helpless. He has been in jail five (5) months while they have had the laboratories and the investigators and that's good; I am glad that we have that. * * *"

After the case was submitted to the jury for a verdict, the jurors returned into open court and asked:

"We would like to know if time served now will be included in the sentence or if...

The Court:

Do you mean to be asking me whether or not he will be given credit for that time? Is that what you are saying?

Terry Hamby - one of the jurors:

Yes, sir.

The Court:

Let me say to you, Ladies and Gentlemen, that ordinarily I wouldn't answer that question except for one fact and that is, his confinement in the local jail prior to his trial, I believe it was five (5) months or something of that sort, was mentioned in the final argument in the case. That is where you got it. If that had not happened I think probably I would not be permitted to answer your question, but since it happened in the way it did I am simply going to tell you that under Kentucky Revised Statutes, Section 532.120, subsection 3, reads as follows:

'Time spent in custody prior to commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the Court imposing sentence towards the serving of the maximum term of imprisonment.'

That's the end of the quotation but to simplify that, to bring it down to what you and I understand, 'yes, he gets credit for time served.'"

After the jury returned to the jury room, counsel for appellant and the trial judge had the following colloquy:

"Motion by Hon. W. E. Rogers, III:

Judge, I object to that request and move for a mistrial on that basis.

The Court:

I will overrule the motion. Mr. Rogers, you are the one that brought up the five (5) months that defendant has been in jail."

The error, if any there was, on the part of the trial judge was invited by appellant's counsel and he cannot now complain.

"B. Mandatory No-Parole Term"

At the conclusion of the persistent felony phase of the trial, counsel for appellant requested the court to inform the jurors

that under the law a conviction of being a persistent felon would prohibit the defendant from receiving probation or parole and they should take that into consideration in setting their sentence. KRS 532.080(7). The court refused to give such an admonition to the jury. The function of the jury is to determine guilt or innocence and to determine sentence if guilt is found. The possibility of pardon or parole is not a proper consideration for the jury in making its determination. In fact, the entire matter of parole is beyond the province of the jury. Brown v. Commonwealth, Ky., 445 S.W. 2d 845 (1969); Green v. Commonwealth, Ky., 556 S.W. 2d 684 (1977). Since the entire matter of parole is beyond the province of the jury, it is clear that the trial judge is under no obligation to instruct the jury on this matter.

VIII

> "Appellant was denied due process by the failure of the trial judge to instruct as requested by the defense that the Commonwealth had the burden to prove each essential element beyond a reasonable doubt."

The trial court in instructing on reasonable doubt said:

> "You will find the defendant guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (a) That in this County on or about the 22nd day of December, 1978, and before the finding of the indictment herein, he entered the store building known as Young's Hardware at 112 East 6th Street in the City of Hopkinsville without permission from the owner or any other person authorized to give such permission;
>
> (b) That in so doing he did not have such permission;
>
> and

(c) That he did so with intention of committing a theft."

The appellant argues that the court should have instructed the jury that it must believe each element of the offense beyond a reasonable doubt before a conviction can be had rather than relying on the preliminary statement of reasonable doubt to apply to each element of the offense. We are of the opinion that today's jurors are sophisticated enough to realize that the reasonable doubt qualification given at the beginning of each separate instruction applies with equal force to each element of the offense thereafter set forth in that instruction. The instructions given by the court properly presented the reasonable doubt requirement.

IX

"Appellant was denied due process of law in violation of the 14th amendment by the entire P.F.O. hearing, because there was no proof, or instructions on, essential elements of the offense, no instruction on 2nd degree PFO, evidence of other unrelated charges and/or another conviction, and an admission of guilt by counsel without an on the record inquiry of appellant."

This argument is directed solely at the persistent felony phase of the trial. Appellant now complains that, (1) the circuit court clerk read to the jury from the indictments; (2) there was no proof of at least two essential elements of the crime with which the appellant was charged; (3) the essential elements of the offense were omitted from the court's instructions; and (4) the instructions did not afford the jury the privilege of determining whether the appellant had committed only one of the previous convictions.

Counsel for appellant did not offer any objection to the clerk's reading from the indictments, nor to the failure of the proof, nor to the instructions themselves. The integrity of the appellant in admitting what the Commonwealth had already proved does not detract from his plea for mercy for appellant. It logically would improve the appellant's chances for a minimum sentence from the jury.

When the alleged errors are stacked one on top of the other, it appears to us that the appellant received a fair trial, at least a tolerably fair trial. Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974); McDonald v. Commonwealth, Ky., 554 S.W. 2d 84 (1977); Berning v. Commonwealth, Ky., 550 S.W. 2d 561 (1977).

The judgment is affirmed.

All concur, except Stephens, J., who did not sit.

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5-17-99 offered by the defendant and refused by the Court! Judge Stephen D. Clardy

Instruction Re: Defendants Testimony

The D is not compelled to Testify and the fact that he does not cannot be used as an influence of guilt and should not prejudice him in any way.

Burden of Proof

In a Criminal case, the burden of proof always rests upon the prosecution. The defendant is under no obligation to prove anything. The Prosecution must prove every Element of its case beyond a reasonable doubt.

Circumstantial Evidence -

An influence may not be built upon an influence.

APPENDIX A

JURISDICTIONS WHICH HAVE RECOGNIZED THE PROPRIETY OF A "NO INFERENCE" INSTRUCTION

I. FEDERAL

1. Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed 257 (1939)
2. United States v. Williams, 521 F.2d 950, 955 (D.C. Cir. 1975)
3. United States v. Schabert, 362 F.2d 369, 372 (2nd Cir. 1966)
4. United States v. English, 409 F.2d 200, 201 (3rd Cir. 1969)
5. United States v. Smith 392 F.2d 302, 303 (4th Cir. 1968)
6. Wilkins v. United States, 376 F.2d 552, 563 (5th Cir. 1967)
7. United States v. Goble, 512 F.2d 458, 470 (6th Cir. 1975)
8. United States v. Rimanich, 422 F.2d 817, 818 (7th Cir. 1970)
9. Caton v. United States, 407 F.2d 367, 374-375 (8th Cir. 1969)
10. United States v. Gustave, 424 F.2d 539, 540 (9th Cir. 1970)
11. Hanks v. United States, 388 F.2d 171, 175 (10th Cir. 1968)

II. STATE

1. Swindle v. State, 279 So.2d 574, 575 (Ala. 1973)
2. State v. Wheeler, 498 P.2d 205, 208 (Ariz. 1972)
3. Powell v. State, 471 S.W.2d 333, 338 (Ark. 1971)
4. People v. Gaulden, 111 Cal.Rptr. 803, 811 (1974)
5. Kimmel v. People, 473 P.2d 167 (Colo. 1970)
6. State Adinolfi, 253 A.2d 34, 35 (Conn. 1968)
7. DeLaine v. State 230 So.2d 168, 175 (Fla. 1970)
8. Clay v. State, 224 S.E.2d 14 (Ga. 1976)
9. Gross v. State, 306 N.E.2d 371, 372-373 (Ind. 1974)
10. State v. Wallace, 152 N.E.2d 266, 270 (Iowa 1967)
11. State v. Kowalec, 468 P.2d 221, 224 (Kan. 1970)
12. Kelley v. Commonwealth, 300 Ky. 136, 187 S.W.2d 796, 800 (1945)
13. State v. Chapman, 358 A.2d 387, 391 (Maine 1976)
14. Pearson v. State, 343 A.2d 916, 920 (Maryland 1975)
15. Commonwealth v. Sullivan, 239 N.E.2d 5, 16 (Mass. 1968)

16. People v. Chambers, 236 N.W.2d 702, 703 (Mich. 1975)
17. State v. Rosen, 158 N.W.2d 202 (Minn. 1968)
18. State v. Baker, 524 S.W.2d 122 (Missouri 1975)
19. State v. Cook, 157 N.W.2d 151, 155 (Neb. 1968)
20. State v. Guibilio, 353 A.2d 165, 169 (N.J. 1976)
21. State v. Garcia, 505 P.2d 862, 863-864 (N.M. 1972)
22. People v. Britt, 383 N.Y.S.2d 602, 603 (1976)
23. State v. Alston, 217 S.E.2d 207, 209 (N.C. 1975)
24. State v. Nelson, 303 N.E.2d 865 (Ohio 1973)
25. State v. Lakeside, 549 P.2d 1287, 1288 (Oregon 1976)
26. Commonwealth v. Danzy, 310 A.2d 291, 292-293 (Pa. 1973)
27. State v. Caron, 219 N.E.2d 68, 71-72 (S.C. 1975)
28. State v. Oswald, 241 N.W.2d 566, 570 (S.D. 1976)
29. Jaffrion v. State, 501 S.W.2d 322, 326 (Texas 1973)
30. State v. Persuitti, 346 A.2d 208, 209 (Vermont 1975)
31. State v. Goldstein, 400 P.2d 368, 369 (Wash. 1965)
32. Champlain v. State, 193 N.W.2d 868, 873 (Wis. 1972)

APPENDIX B

JURISDICTIONS WHICH PRECLUDE THE "NO INFERENCE" INSTRUCTION

1. Green v. Commonwealth, Ky., 488 S.W.2d 339 (1972)
2. McNeeley v. State, 409 P.2d 135 (Nev. 1965)
3. Brannin v. State, 375 P.2d 276 (Oklahoma 1962)